

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PAUL D.S. EDWARDS,

Plaintiff,

JUAN MARTINEZ, INC., *et al.*,

Defendants.

Case No. 2:20-cv-00570-ART-DJA

ORDER DENYING MOTION TO
CERTIFY ORDERS (ECF NOS. 141,
147, AND 155) FOR APPEAL AND
MOTION TO STRIKE

AND RELATED COUNTERCLAIMS

This action concerns Plaintiff Paul D.S. Edwards's claims that Defendant Juan Martinez, Inc. and others twice spam-called him in violation of state and federal law and Defendants' counterclaims for abuse of process and surreptitious recording.

Before the Court are (1) Mr. Edwards's Motion to certify certain orders by this Court for interlocutory appeal (ECF No. 158); (2) Defendants' Motion for Partial Summary Judgment on their abuse of process Counterclaim (ECF No. 159); and (3) Mr. Edwards's Motion to Strike Defendants' Motion for Partial Summary Judgment and Exhibits (ECF No. 161). The Court denies Mr. Edwards's motion to certify (ECF No. 158) and motion to strike (ECF No. 161) and grants Mr. Edwards 21 days to respond to Defendants' Motion for Partial Summary Judgment (ECF No. 159).

I. BACKGROUND

Mr. Edwards brought this case in state court in 2019, alleging violations of his privacy under state and federal law due to several unwanted and potentially illegal spam calls, and Defendants removed to this Court. (ECF No. 1-2 at 2.) Defendants alleged two counterclaims under state law: one for surreptitious

1 recording in violation of NRS 200.620 and one for abuse of process. (ECF No.
2 131.)

3 In its prior orders, the Court denied Mr. Edwards's motions to dismiss and
4 strike Defendant's counterclaims (ECF Nos. 141, 147). In response to Mr.
5 Edwards's motion for reconsideration (ECF No. 143), the Court held that
6 Defendants had standing to bring their state law counterclaims, over which the
7 Court had supplemental jurisdiction (ECF No. 147 at 8-9) and invited the parties
8 to move for summary judgment on Defendants' abuse of process counterclaim
9 (*Id.* at 10). Mr. Edwards then moved to recuse Judge Traum. (ECF No. 148.) The
10 Court denied the motion for recusal and granted the parties an additional 30 days
11 to file summary judgment motions on the abuse of process counterclaim. (ECF
12 No. 155.)

13 Mr. Edwards then moved (ECF No. 158) to certify for interlocutory appeal
14 the Court's orders on his motions to dismiss and strike (ECF No. 141), reconsider
15 (ECF No. 147), and recuse (ECF No. 148), and Defendants filed a Motion for
16 Partial Summary Judgment on their abuse of process counterclaim (ECF No.
17 159). Mr. Edwards moved to strike that motion (ECF No. 161) but has not
18 otherwise opposed it.

19 **II. DISCUSSION**

20 A. Motion to Certify

21 Mr. Edwards seeks certification on the following four questions relating to
22 the courts prior orders (ECF Nos. 141, 147, and 155) on Mr. Edwards's motions
23 to dismiss (ECF No. 134), to strike (ECF No. 136), for reconsideration (ECF No.
24 143), and for recusal (ECF No. 148): (1) whether Defendants established Article
25 III standing as to their counterclaims; (2) whether they suffered any "concrete"
26 and "particularized," and "actual or imminent" injury-in-fact; (3) whether they
27 substantiated their abuse of process counterclaim against Mr. Edwards; and (4)
28 whether Judge Traum is required to recuse herself from this case. (ECF No. 158

1 at 5.)

2 Interlocutory appeals of non-final judgments are authorized when
3 “exceptional circumstances justify a departure from the [final judgment rule]. . . .
4 .” 28 U.S.C. § 1292(b). Under the final judgment rule, federal courts of appeal
5 generally have jurisdiction only over “appeals from . . . final decisions of the
6 district courts of the United States.” See 28 U.S.C. § 1291. A district court will
7 certify a non-final order for interlocutory appeal when three conditions are met:
8 (1) “there [is] a controlling question of law”; (2) “there [are] substantial grounds
9 for difference of opinion as to that question”; and (3) “an immediate resolution of
10 that question may materially advance the ultimate termination of the litigation.”
11 *ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130 (9th
12 Cir. 2022) (quoting *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020,
13 1026 (9th Cir. 1981)). The party seeking interlocutory appeal bears the burden of
14 showing that these three prongs are satisfied. *Couch v. Telescope Inc.*, 611 F.3d
15 629, 633 (9th Cir. 2010). Mr. Edwards fails to show that there are legal issues
16 justifying an interlocutory appeal.

17 Mr. Edwards’s first and second questions concern the Court’s conclusion
18 that Defendants have standing to bring their counterclaims. Mr. Edwards has
19 not shown that “there [are] substantial grounds for difference of opinion as to”
20 the standard for Article III standing, including injury-in-fact. *ICTSI Oregon, Inc.*
21 22 F.4th at 1130. The Ninth Circuit has identified three circumstances where the
22 law is sufficiently unclear to justify an interlocutory appeal: (1) the circuit courts
23 are split and the Ninth Circuit has not yet spoken on the issue; (2) the issue
24 involves complicated questions of foreign law; or (3) the issue presents a novel
25 and difficult question of first impression. *Couch*, 611 F.3d at 633. To the extent
26 that Mr. Edwards has raised controlling legal questions, he has pointed to no
27 circuit splits, complicated issues of foreign law, or issues presenting a novel and
28 difficult question of first impression.

1 Mr. Edwards's third question goes to whether Defendants have
2 substantiated their abuse of process counterclaim. Nevada recognizes an abuse
3 of process claim. *LaMantia v. Redisi*, 118 Nev. 27, 30 (2002). Mr. Edwards argues
4 that Defendants have not established the facts necessary to substantiate it. (See
5 ECF No. 158 at 18-21.) Mr. Edwards has failed to show that the abuse of process
6 claim involves a controlling question of law on which "there [are] substantial
7 grounds for difference of opinion" requiring an immediate appeal. *See ICTSI*
8 *Oregon, Inc.* 22 F.4th at 1130. Rather, this claim is the subject of Defendants'
9 pending Motion for Partial Summary Judgment, which Mr. Edwards has moved
10 to strike but not opposed. (ECF Nos. 159, 161.)

11 On his fourth question, with respect to recusal, Mr. Edwards also has failed
12 to show that issue involves a controlling question of law, on which "there [are]
13 substantial grounds for difference of opinion," requiring an immediate appeal.
14 *See ICTSI Oregon, Inc.*, 22 F.4th at 1130. The legal standard for recusal is not in
15 question here and the denial of a recusal motion is reviewed for abuse of
16 discretion. *See Glick v. Edwards*, 803 F.3d 505, 508 (9th Cir. 2015) (discussing
17 recusal under 28 U.S.C. §§ 144 and 455).

18 Finally, Mr. Edwards has failed to show that immediate resolution of any
19 of these questions would materially advance the ultimate termination of this
20 litigation.

21 B. Motion to Strike

22 Mr. Edwards moves to strike Defendants' Motion for Partial Summary
23 Judgment and Exhibits under Fed. R. Civ. P. 12(f), Local Rule IA 10-1(d), and the
24 Court's "inherent power" to control its docket. Mr. Edwards' main concerns are
25 that Defendants filed their motion after the deadline set by the Court and their
26 exhibits do not comply with the Court's local rules. (ECF No. 161 at 4-5.)
27 Defendants concede that their motion was late-filed but argue that striking is not
28 an appropriate remedy because Rule 12(f) does not apply, the late-filing was due

1 to an excusable calendaring error, their exhibits are relevant to their Motion for
 2 Partial Summary Judgment, and any violations of the local rules do not prejudice
 3 Mr. Edwards. (ECF No. 163.) The Court declines to strike Defendants' motion and
 4 exhibits.

5 Rule 12(f) does not apply to Defendants' motion or exhibits because they
 6 are not pleadings. *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.
 7 1983) (holding the trial court erred in striking plaintiff's motion to reconsider
 8 because it was not a pleading). Pleadings are defined by Rule 7(a), and motions
 9 are not included in that definition. 5C Charles Alan Wright & Arthur R. Miller,
 10 Federal Practice & Procedure § 1380 (3d ed. 2023) ("Rule 12(f) motions only may
 11 be directed towards pleadings as defined by Rule 7(a); thus motions . . . are not
 12 subject to Rule 12(f).") Because Defendants' motion is not a pleading, Rule 12(f)
 13 does not apply.

14 Defendants concede that their motion was late-filed but argue that this was
 15 excusable error and striking it is not justified. Defendants' motion was due on
 16 Friday, June 23, 2023, and they filed it the next business day, on Monday, June
 17 26, 2023. (ECF No. 161 at 2.) A party may only file a document past its deadline
 18 with the Court's permission, Fed. R. Civ. P. 6(b); LR 26-3, and, as Mr. Edwards notes,
 19 the Court may strike any document that does not conform to the local or
 20 federal rules. *See* LR IA 10-1(d). But courts generally reserve their "inherent
 21 powers" to strike for the punishment of "abusive conduct." *Ready Transp., Inc. V.*
 22 *AAR Mfg.*, 627 F.3d 402, 404 (9th Cir. 2010). The Court declines to strike
 23 Defendants' Motion which was late-filed due an excusable calendaring error, not
 24 any abusive conduct. Similarly, the Court declines to strike Defendants' motion
 25 exhibits (ECF No. 159).

26 Finally, Mr. Edwards argues in his Motion to Strike that Defendants' have
 27 made several assertions in their Motion for Partial Summary Judgment that are
 28 not supported by the record. (ECF No. 161 at 8-10.) Such points are better

1 addressed in a response to Defendants' Motion.

2 **III. CONCLUSION**

3 For the reasons stated, the Court denies Mr. Edwards's Motion to Certify
4 (ECF 159) Orders 141, 147, and 155 for interlocutory appeal, denies Mr.
5 Edwards's Motion to Strike, and grants Mr. Edwards 21 days to oppose
6 Defendants' Motion for Partial Summary Judgment.

7 Dated this 9th day of November 2023.

8
9
10 
11

12 ANNE R. TRAUM
13 UNITED STATES DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28